Supreme Court, U.S.
FILED

97-214 AUG 4 1997

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

DONALD R. KURZ, et al.

Petitioners,

v.

THE PHILADELPHIA ELECTRIC COMPANY, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Ronald L. Wolf, Esquire*
Martina W. McLaughlin, Esquire
LITVIN, BLUMBERG, MATUSOW & YOUNG
The Widener Building, 18th Floor
1339 Chestnut Street
Philadelphia, PA 19107
(215) 557-3300
Counsel for Petitioners
**Counsel of Record*

184 PP

QUESTIONS PRESENTED

Under ERISA, when does a plan administrator/fiduciary who is also the employer have a fiduciary duty to truthfully tell plan participants that a change to the pension plan is under consideration?

Under ERISA, does the six-year statute of limitations for a breach of fiduciary duties set forth in 29 U.S.C. §1113 apply when the breach of duty involves fraud or concealment?

PARTIES TO THE PROCEEDING

The Petitioners are the class members who consist of former employees of PECo who retired from January through and including June 1987 under the PECo Annuity Service Plan effective January 1, 1987. [Appendix at 64a]. This class includes the following named plaintiffs: Donald R. Kurz, William W. Anderson, James Beck, William T. Bergen, Charles W. Bowden, William H. Brown, Richard Cahill, Armando L. Capoferri, Robert C. DeMarco, James J. DiLolle, Sr., Vincent J. DiMaggio, John J. DiValentino, Jr., William E. Drumel, Victor J. Gibialante, Francis T. Golden, James J. Granger, Elmer D. Greim, Jr., James H. Hair, John M. Hoopes, Benjamin J. Kilian, George c. Linthicum, Hubert A. McKown, Jr., Henry P. McNamee, Oliver K. Messner, Robert E. Miller, John A. Morse, Samuel J. Mullen, John A. Munley, Stanley B. Myers, John J. Nusspickel, James W. Patterson, Alfred B. Schumann, Joseph C. Sharkey, William H. Smoyer, Woodrow E. Snyder, James D. Sutliff, Edward J. Vetner, Dominic C. Viglianese, G. Earle Watt, Frederick W. Winterling, and John R. Young.

The Respondents are Philadelphia Electric Company, Service Annuity Plan of Philadelphia Electric Company, Charles L. Fritz, J.L. Everett, III, and John H. Austin, Jr.

RULE 29.6 STATEMENT

There are no affiliates or subsidiaries of Philadelphia Electric Company other than wholly-owned subsidiaries to petitioners' knowledge.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background 2

B. The Proceedings Below 8

REASONS FOR GRANTING THE WRIT FOR CERTIORARI 16

A. This Case Presents an Important Question of Federal Law that has not been Settled by the Supreme Court 18

B. The Third Circuit's Decision Conflicts with the Duties of a Fiduciary under ERISA as Espoused by this Court 21

C. The Third Circuit's Decision Conflicts with Decisions of other Courts of Appeals 22

D. The Third Circuit's Decision Regarding the Applicable Statute of Limitations Conflicts with Decisions of Other Courts of Appeals 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: PAGE

Ballone v. Eastman Kodak Co.,
109 F.3d 117 (2nd Cir. 1997) 17, 19, 20, 22-24

Barker v. American Mobile Power Corp.,
64 F.3d 1397 (9th Cir. 1995) 26

Basic Inc. v. Levinson,
485 U.S. 224, 236, 108 S. Ct. 978,
986, 99 L. Ed.2d 194 (1988) 25

Berlin v. Michigan Bell Telephone Co.,
858 F.2d 1154 (6th Cir. 1988) 19

Diduck v. Kaszycki & Sons Contractors, Inc.,
874 F.2d 912 (2d Cir. 1989) 26

Donovan v. Bierwirth,
680 F.2d 263 (2nd Cir. 1982) 18

Drennan v. General Motors Corp.,
977 F.2d 246 (6th Cir. 1992) 19

Fischer v. Philadelphia Electric Co.,
96 F.3d 1533 (3d Cir. 1996) 12, 13, 17, 20, 24

Fischer v. Philadelphia Electric Co.,
994 F.2d 130 (3d Cir. 1993) 9, 10, 24

Hockett v. Sun Company, Inc.,
109 F.3d 1515 (10th Cir. 1997) 17, 19

J. Giels Band Employee Benefit Plan v.
Smith Barney Shearson, Inc.,
76 F.3d 1245 (1st Cir. 1996), cert. denied,
136 L.Ed.2d 39, 117, S.Ct.81 (1996) 26

CASES: Page

Kurz v. Philadelphia Electric Co.,
96 F.3d 1544 (3d Cir. 1996) 13, 24, 26

Kurz v. Philadelphia Electric Co.,
994 F.2d 136 (3d Cir. 1993) 10

Larson v. Northrop Corp.,
21 F.3d 1164 (D.C. Cir. 1994) 26

Maez v. Mountain States Tel. and Tel., Inc.,
54 F.3d 1488 (10th Cir. 1995) 19

Morse v. Stanley,
732 F.2d 1139, 1145 (2d Cir. 1984) 18

Mullins v. Pfizer, Inc.,
23 F.3d 663 (2d Cir. 1994) 19

Muse v. International Business Machines Corp.,
103 F.3d 490 (6th Cir. 1996),
cert. denied, 137 L.Ed.2d 1048 (1997) 17, 19, 24

Shaefer v. Arkansas Medical Society,
853 F.2d 1487 (8th Cir. 1988) 26

Varity Corp. v. Howe,
___ U.S. ___, 134 L. Ed.2d,
116 S. Ct. 1065 (1996) 16-18, 21-23

Vartanian v. Monsanto Co.,
14 F.3d 697 (1st Cir. 1994) 19

Wilson v. Southwestern Bell Telephone Company,
55 F.3d 399 (8th Cir. 1995) 17, 19, 24

* * *

STATUTES — PAGE

28 U.S.C. §1254(1) 1

29 U.S.C. §1104 . . . . . 2, 18

29 U.S.C. §1113 . . . . . i, 2, 11, 12, 15, 17

29 U.S.C. §1132 . . . . . 2, 25

OPINIONS BELOW

The most recent opinion of the Court of Appeals in this case is reported at 96 F.3d 1544 (3d Cir. 1996) [Appendix at 1a-22a]. The most recent opinions of the District Court in this case (Appendix at 47a-77a) are not reported.[1] The denial of a Writ of Certiorari by the United States Supreme Court in this case is reported at 510 U.S. 1020, 114 S. Ct. 622 (1993) [Appendix at 78a]. The first opinion of the Court of Appeals is reported at 994 F.2d 136 (3d Cir. 1993) [Appendix at 91a-98a]. The previous opinion of the District Court in this case (Appendix at 99a-141) is not reported. The Third Circuit Court of Appeals' opinion denying a petition for rehearing following the first decision by the Court (Appendix at 142a-143a) is not reported. The Third Circuit Court of Appeals' opinion denying the petition for rehearing on behalf of class members Frank Monzo, Martin Morgan and Gloria McEntee following the second decision by the Court (Appendix at 144a-146a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 1, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

---

[1] In the District Court, the Kurz case was consolidated with the case of Fischer v. Philadelphia Electric Co., because the legal issues involved were virtually identical. The Court of Appeals also reversed the decision in favor of the Fischer class members based in part upon the same legal issues presented in this Petition for Writ of Certiorari. The Fischer class members filed a Petition for Writ of Certiorari with the United States Supreme Court on December 24, 1996, which was denied. In the event that the Court grants Certiorari in this case, it is requested that the Court reconsider its decision in Fischer and grant Certiorari in that case as well given the common identity of legal issues involved.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are 29 U.S.C. §1104(a), 1113 and 1132(a) and (e). They are reproduced in the Appendix. [Appendix at 147a-148a].

STATEMENT OF THE CASE

This petition involves the claim that PECo violated a fiduciary duty under ERISA owed to former employees who participated in the company's pension plan prior to their retirement. The petitioners alleged and, with respect to some of the class members' claims, the District Court agreed, that PECo misled them about its "serious consideration" of a possible change to the pension plan formula which would have increased their retirement benefits. The Third Circuit Court of Appeals reversed the decision of the District Court finding that PECo was not seriously considering a change to the pension plan under a new three-prong test which the court imposed. The specific issue presented in this petition is when under ERISA does a fiduciary duty arise on the part of a plan administrator who is also an employer to truthfully tell plan participants that it is considering a possible change to the pension plan. The second issue presented in this petition concerns whether the six-year statute of limitations for breach of fiduciary duty in cases involving fraud or concealment applies to cases where the breach itself involves fraud or concealment.

A. Factual Background

On July 2, 1987, PECo issued an official bulletin to their employees announcing an improved minimum formula for the calculation of pension benefits to be effective August 1, 1987. The petitioners had retired from January 1 through June 1, 1987 and, therefore, were denied eligibility for these enhanced benefits. The pension benefits they received were calculated under the old formula which was long recognized by PECo as being lower than average for the utility industry.

Initial discussions regarding amendment of the pension plan began at least two years before its official adoption. Significantly,

by the time respondents were making their retirement decisions, PECo had already anticipated the need to make improvements to the pension plan and, in fact, had set a target date by which to accomplish this goal. PECo, however, made a conscious decision not to disclose this information to prospective retirees before the official announcement of the amendment on July 2, 1987. As a result, the respondents were falsely told that there were no plans to amend the pension plan in response to questions posed to their retirement counselors and/or supervisors at a time when they were making important decisions about the timing of their retirement.

The extensive history of PECo's planning efforts in developing the amendment to the Service Annuity Plan proves that "serious consideration" was being given to a change in the Service Annuity Plan to enhance pension benefits since at least March 1, 1987.[2]

---

[2] Petitioners submit that plans to change pension benefits were under serious consideration at an even earlier date but at the very least by March 1, 1987 -- the date on which the District Court determined serious consideration began. Indeed, petitioners strenuously argued in the Court below that the date should at least be February 27, 1987 when Frederick Beaver, the Administrative Assistant in the Benefits Division, contacted on outside consultant, TPF&C and, on behalf of PECo, requested cost calculations for a pension formula that represented a change to the pension plan. It was that same activity, contacting an outside consultant, which the District Court in the Fischer case held constituted "serious consideration." Even though it is only two days earlier, it is of utmost significance because under the District Court's ruling, those people whose retirement date became effective on March 1, 1987, were not entitled to recover. If the Court grants certiorari in this case, the Subclass B petitioners (those class members whose retirement was effective before March 1, 1987) ask the Court to consider their claim that plans to change the pension formula were under sufficient consideration to

(continued...)

From at least as early as 1977, on an annual or bi-annual basis, PECo participated in surveys that compared the employee pension benefits of companies in the utility industry. These surveys assessed and ranked the utility company's respective pension benefits. For many years, the survey was performed by the Public Service Electric and Gas Company and was utilized "to look to see whether or not any changes in the future should be made." Frederick Beaver, an administrative assistant in Personnel and Industrial Relations Department, was one of the employees that would review the comparative studies performed by PSE&G.

Previously, PECo had amended its pension formula to increase benefits, effective as of January 1, 1982, after a survey by PSE&G indicated that PECo's pension benefits were low, compared to other companies in the industry. This is significant because in approximately 1983, PECo began to see some erosion in its positioning relative to other surveyed utilities with respect to pension benefits being offered. PECo's position was eroding basically as a result of other companies improving their plan formulas. As a result, over a period of years prior to 1987, there was a growing interest in adjusting the PECo plan formula to improve benefits. The events set forth below well documents this point.

In 1985, at the request of PECo's Finance Division, TPF&C, an outside actuarial consultant, performed an analysis for a long-term financial planning study, which included a projection of what PECo's pension obligations would be in the future. PECo provided information concerning its long-range "plan improvements" which were listed, along with the projected date on which the improvements would become effective, in the March 14, 1985 preliminary report prepared by TPF&C. One of the plan improvements identified for January 1, 1988 was to increase the integration percentage of the minimum formula to .35 from .30. This is an increase to the multiplier used to calculate the part B

---

[2](...continued)

trigger PECo's duty to truthfully inform them of the plan before their retirement.

pension benefits. Significantly, this projected pension improvement identified in 1985 was part of the improvement which was adopted on August 1, 1987! As Mr. Fleisher from TPF&C acknowledged at trial, PECo merely moved up the implementation date of this plan improvement from January 1988 to August 1, 1987.

On October 2, 1985, the final version of the TPF&C pension funding study for the Service Annuity Plan was presented to PECo during which there was a discussion regarding potential changes that could be made to the pension plan. These discussions continued among PECo management personnel over the next couple of years. In October 1985, Michael Crommie, the Director of Employee Services Division, and Mr. Beaver had discussions regarding potential changes to the pension plan that could affect the level of benefits provided in order to increase PECo's position in comparison to other utility companies. In the 1985-1986 time frame, Mr. Beaver and Mr. Crommie also had discussions with Ronald Downs, the Manager of the Industrial Relations Department, regarding the competitive position of PECo's pension benefits and what alternatives might be available for improvement to the pension plan, including the possibility of modifying the service factors used in calculating pension benefits.

The activity aimed at improving the pension plan continued in 1986 when, after PSE&G had decided to discontinue the benefits survey, PECo assumed the task of compiling the survey. It was Mr. Crommie's intention to complete the survey by February 20, 1987 because, "from a benefit planning standpoint, it's always worthwhile to receive the information as early in the year as you possibly can get it... to give you as much time for planning for that particular year." Obviously, Mr. Crommie was anticipating the foreseeable likelihood that the survey would verify the need to improve the PECo pension plan given the past evidence of the erosion of the benefits plan in comparison with other surveyed utility companies. Indeed, as of June 1986, Mr. Crommie informed management of the continuing deterioration of the pension plan and stated that changes might be considered to alleviate that situation. Then, on June 23, 1986, Mr. Crommie sent a memorandum to Mr. Downs regarding the 1986 pension survey in which he asked

whether to anticipate a study to be conducted by TPF&C based upon the 1987 survey results. Mr. Downs responded:

> **"Probably not, but suggest we consider after we see survey results. Obviously, some input from TPF&C will be required with regard to our recommended modifications to plan!"**

This verifies that PECo already had recommended modifications to the pension plan as of June 1986.

Mr. Beaver authored the 1986 pension survey report which was issued May 22, 1987. In approximately February 1987, he received the data from the other utilities participating in the 1986 pension study. As a result of the survey, Mr. Beaver concluded that out of 23 comparison companies, PECo's position was below the mid-point and significantly below the mid-point for all management cases; PECo's position had become fairly non-competitive. Consequently, PECo increased its activity with regard to evaluation of alternatives to improve the pension plan. Mr. Beaver discussed with colleagues what PECo should do about the further deterioration of its pension benefits relative to other utility companies and, significantly, it was his thought that, based on the results of the pension survey data, it was appropriate to make an improvement to the pension plan in 1987. Consequently, on February 27, 1987, Mr. Beaver called Don Fleisher at TPF&C and asked questions concerning a possible pension plan change. Specifically, Mr. Beaver asked Mr. Fleisher to give him a cost for a pension formula that represented a change to the pension plan. Mr. Fritz, the Vice President of Personnel and Industrial Relations, was aware in February 1987 that TPF&C was working with PECo to evaluate such a formula change to the pension plan.

Thereafter, PECo undertook systematic activity to implement the pension plan change. This included the following activity:

- In March 1987 Don Fleischer of TPF&C began calculating benefit projections for senior PECo

officers which included a change to the pension plan.

- Through the month of April 1987 TPF&C worked on proposed changes to the plan.

- Don Fleischer of TPF&C outlined four proposals to PECo as early as April 2, 1987 and provided additional updated information on April 13 and April 20, 1987.

- At the April 24, 1987 meeting with the IGA, Mr. Fritz stated that this was a good year for changes to the pension plan since it was well funded and PECo's plan was below the industry norm.

- On May 6, 1987, Murdoch of TPF&C met with Mr. Crommie of PECo to discuss two competing alternatives for changing the plan.

- On May 11, 1987, Murdoch noted a conversation with Mr. Fritz regarding pressure from the IGA to improve the pension plan.

- On May 13, 1987, Mr. Fleischer of TPF&C noted a conversation with McGinley and Beaver of PECo that the company was being pressured by the IGA for improvements to the pension plan and that some commitment had already been made.

- On May 20, 1987, TPF&C prepared a discussion outline of PECo's retirement plan study commenting that PECo needed to improve its pension.

- In a May 20, 1987 outline, the employee services division of PECo concluded that the time for a pension change had arrived given PECo's deteriorating position vis a vis other utilities.

The extensive history of PECo's activities aimed at remaining competitive with other utilities by improving its pension plan clearly and convincingly documents that by March 1, 1987, **at the latest**, PECo was seriously considering such an option. The facts established of record in this case likewise document that PECo intentionally withheld information regarding its planning efforts from the petitioners. Indeed, the evidence of PECo's conduct was so iron clad that the District Court (in the first opinion) acknowledged that PECO had an actual policy of keeping potential changes to the pension plan confidential before being voted on by the Board of Directors. [Appendix at 132a-133a]. Petitioners presented glaring evidence of the nature and extent of the concealment of information by PECo. For example, defendant, Charles L. Fritz, PECO's Vice President of Personnel and Industrial Relations, claims that he thought it was important that potential retirees at least be told, in answer to questions regarding this matter, that the IGA (an employee organization) was in fact asking for improvements to the pension plan because:

> "I think it would be wrong for the interviewer to say that nothing was being discussed or looked into. I think it would have been dishonest, and we certainly try to be completely above board in this area." [Fritz Deposition, pps. 160-161].

Yet, in March, 1987, after he had specifically told the IGA that 1987 was the right time to make such a change to the pension plan, Mr. Fritz intentionally did not inform Mr. Crommie, supervisor of the retirement interviewers, of this fact, claiming that "he didn't need to know many of these things at that time...." [Fritz Deposition, p. 84].

B. The Proceedings Below

Despite the extensive evidence, as outlined above, the District Court, when initially considering the case, decided that there were no material misrepresentations made to petitioners because PECo had not given "serious consideration" to changing the pension plan until such plans were officially announced. The District Court granted summary judgment in favor of the

respondents. The petitioners appealed to the Court of Appeals which relied upon convincing factual evidence to conclude that the District Court's characterization of the record as lacking evidence of material misrepresentations by PECo was incorrect and therefore reversed and remanded the case for trial. In so deciding, the Court rejected PECo's explanation that since the company had never told the benefits counselors that it was considering changes to the pension plan, then the counselors' representations to the respondents, that no such plans were being contemplated, were truthful, holding, in the companion case of Fischer v. Philadelphia Electric Co., 994 F.2d 130, 135 (3d Cir. 1993) [Fischer I, Appendix at 88a]:

> "This explanation will not do, for the fiduciary obligations owed to the plan participants were owed by PECo as plan administrator. These obligations cannot be circumvented by building a chinese wall around those employees on whom plan participants reasonably rely for important information and guidance about retirement."

The Court of Appeals in the Fischer case also gave the District Court the following specific instructions to follow on remand when determining whether the contents of the particular communications PECo made to the petitioners constituted affirmative misrepresentations:

> "The content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of fact on remand. Whether an affirmative misrepresentation was 'material', however, is a 'mixed question of law and fact.' In the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. Included within the overall materiality inquiry will be an

> inquiry into the seriousness with which a particular change to an employee pension plan is being considered at the time the misrepresentation is made. All else equal, the more seriously a plan change is being considered, the more likely a misrepresentation, e.g., that no change is under consideration, will pass the threshold of materiality." Id. [Fischer I, Appendix at 89a]. [Citations omitted].

Finally, in the first opinion issued by the Court of Appeals in the Kurz case, the Court specifically rejected the establishment of a bright-line rule for the determination of when serious consideration begins, noting that "tying serious consideration to a single objective event in the present context would work unfairly in some instances." Kurz v. Philadelphia Electric Co., 994 F.2d 136 (3d Cir. 1993) [Kurz I, Appendix at 97a].

The respondents filed a petition for rehearing and rehearing en banc to the Third Circuit Court of Appeals which was denied. [Appendix at 142a-143a]. Thereafter, the respondents filed a Petition for Writ of Certiorari with this Court which was also denied. [Appendix at 78a].

On remand, the main question which the District Court was required to decide was when PECo began to seriously consider a change to the pension plan formula. The District Court determined that serious consideration began on March 1, 1987 based upon the following conclusions.

> At that time, according to Mr. Fritz, PECo began considering not only improving the plan for journeyman level employees, but also higher management type positions. Fritz had met with IGA representatives and stated that the timing was right for making significant changes in the pension plan, and that the company was looking into several alternatives, including the IGA's proposal from the year before. Fritz represented that the change would be in the order of a ten percent increase.

> Also in March, 1987, Towers Perrin began calculating specific benefit projections for senior PECo officers.
>
> Also supporting this conclusion are the notes of Don Fleischer of Towers Perrin of May 13, 1987, in which he noted a conversation with John McGinley and Fred Beaver of PECo that the company was being pressured by the IGA for improvements to the pension plan and that "some commitment [had] already [been] made." These PECo executives, at least, believed the company had been seriously considering improving the pension formula for some time. [*Opinion in the Court, May 16, 1994, p. 23*, Appendix at 63a-64a].

The Court found that PECo, thereafter, undertook systematic activity to implement the pension plan change. [Id, *Conclusion of Law No. 13,* Appendix at 64a].

In addition, because the complaint in the Kurz case was not filed until approximately three and one-half years after the pension plan change was announced by PECo, the District Court was required to determine whether plaintiffs' claims for breach of fiduciary duty were timely under the statute of limitations imposed by ERISA under 29 U.S.C. §1113. The District Court concluded that because plaintiffs' complaint alleged concealment of the plan to implement the pension change and since PECo admitted that it had a policy of keeping such matters confidential and telling potential retirees that no such plans existed until formally announced, then the six-year statute of limitations for cases of concealment set forth in 29 U.S.C. §1113 was applicable. The Court also held that since the lawsuit was filed less than six years after the breach of fiduciary duty was discovered by the plaintiff class members, their claims were not barred by the applicable statute of limitations. [*Opinion of the District Court, May 16, 1994, Conclusions of Law Nos. 22-24,* Appendix at 65a].

The District Court then divided the class members into two subclasses: Subclass A consisting of all those members of the Kurz class who solicited information and retired after PECo's duty to inform retirees of the pending change arose on March 1, 1987; and Subclass B consisted of all other members of the Kurz class. [*Opinion of the District Court, May 16, 1994, Conclusion of Law No. 21, p. 25,* Appendix at 65a]. Thereafter, the Court held a separate hearing to determine the petitioners who constituted Subclass A of the damages to which they were entitled. In the damages phase of the trial, the District Court also clarified its prior opinion and held, on the basis of precedent from the Third Circuit, that once PECo began to seriously consider changes to the pension plan, it had a duty to correct information disseminated before that date to the effect that no change was forthcoming and was also under an affirmative duty to now inform even those participants who did not specifically ask about any such changes that the company was seriously considering an amendment to the pension plan. [*Opinion of the District Court, August 22, 1995,* Appendix at 69a-74a]. The Court then entered an order specifically identifying those members of Subclass A and the amount of damages to which they were entitled. [Appendix at 76a-77a].

Both parties then appealed to the Third Circuit Court of Appeals. The petitioners, on behalf of the Subclass B members, argued that the District Court's decision that serious consideration did not begin until March 1, 1987 was clearly erroneous given the extensive history of PECo's planning efforts before that date. The respondents, to the contrary, argued that the District Court clearly erred in finding that serious consideration began as early as March 1, 1987, arguing that senior management having authority to implement such a pension plan change had not considered such a program until June 1987.

Despite the factual nature of the decision made by the District Court, the Court of Appeals reversed the decision of the District Court in favor of the Subclass A plaintiffs, finding that serious consideration of the pension plan change did not begin until May 28, 1987, thereby precluding members who retired before that date from recovery; and secondly, as to those class members who

retired after May 28, 1987, that their claims were barred by the applicable statute of limitations under ERISA set forth in 29 U.S.C. §1113.

To reach the decision regarding the date when serious consideration began, the Court in Kurz II relied upon the new definition of serious consideration espoused by the Court in Fischer v. Philadelphia Electric Co., 96 F.3d 1533, 1539 (3d Cir. 1996), [Fischer II]. Kurz v. Philadelphia Electric Co., 96 F.3d 1544, 1548 (3d Cir. 1996) [Kurz II, Appendix at 7a-8a]. In Fischer II, the Court redefined serious consideration as follows:

> "... We believe that the following formulation of serious consideration is appropriate: serious consideration of a change in plan benefits exists when (1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement the change." [Fischer II, Appendix at 34a].

The Court determined that these three factors must interact and coalesce to form a composite picture of serious consideration. The Court's further explanation of these factors underscores the restrictiveness of this definition which had the intended result of precluding the Subclass A petitioners, who the District Court after reviewing a substantial amount of evidence had concluded were indeed misled by the affirmative misrepresentations of PECo, from recovering. While lengthy, the Court's explanation bears citation in full here:

> "The first element, a specific proposal, distinguishes serious consideration from the antecedent steps of gathering information, developing strategies, and analyzing options. A company must necessarily go through these preliminary steps before its deliberations can reach the serious stage. This factor does not mean, however, that the proposal must describe the plan in its final form. A specific proposal can contain several alternatives, and the plan as finally implemented may differ somewhat

from the proposal. What is required, consistent with the overall test, is a specific proposal that is sufficiently concrete to support consideration by senior management for the purpose of implementation.

The second element, discussion for implementation, further distinguishes serious consideration from the preliminary steps of gathering data and formulating strategy. It also protects the ability of senior management to take a role in the early phases of the process without automatically triggering a duty of disclosure. This factor recognizes that a corporate executive can order an analysis of benefits alternatives or commission a comparative study without seriously considering implementing a change in benefits. Preliminary stages may also require interaction among upper level management, company personnel, and outside consultants. These discussions are properly assigned to the preliminary stages of company deliberations. Consideration becomes serious when the subject turns to the practicalities of implementation.

The final element, consideration by senior management with the authority to implement the change, ensures that the analysis of serious consideration focuses on the proper actors within the corporate hierarchy. As noted, large corporate entities conduct regular or on-going reviews of their benefit packages in their ordinary course of business. These entities employ individuals, including middle and upper-level management employees, to gather information and conduct reviews. The periodic review process may also entail contacting outside consultants or commissioning studies. During the course of their employment, the employees assigned these tasks necessarily discuss their duties and the results of their studies. These discussions may include issues

> of implementation. The employees may also make recommendations to upper level management or senior executives. As a general rule, such operations will not constitute serious consideration. These activities are merely the ordinary duties of the employees. Until senior management addresses the issue, the company has not yet seriously considered a change.
>
> Consideration by senior management is also limited to those executives who possess the authority to implement the proposed change. This focus on authority can be used to identify the proper cadre of senior management, but it should not limit serious consideration to deliberations by a quorum of the Board of Directors, typically the only corporate body that in a literal sense has the power to implement changes in benefits packages. It is sufficient for this factor that the plan be considered by those members of senior management with responsibility for the benefits area of the business, and who ultimately will make recommendations to the Board regarding benefits operations." Id, 96 F.3d at 1539-1540. [Appendix at 34a-35a].

On October 1, 1996, the Court of Appeals entered judgment in favor of the respondents holding that serious consideration did not arise until May 28, 1987. Despite the fact that PECo was admittedly engaged in gathering information from outside consultants concerning development of a pension plan change way before that date, the Court held that those petitioners who were told that no plans were in the works were not misled because PECo had not been seriously considering those plans for implementation until J.L. Everett, III, PECo's chief executive officer, and John H. Austin, Jr., PECo's president and chief operating officer, considered a request by Charles Fritz, to proceed further with the recommendation of a specific proposal for a pension plan change. The Court also reversed the decision in favor of those Subclass A members who retired after the date of serious consideration, holding that their claims were time-barred by the three year "actual

knowledge" statute of limitations set forth in ERISA, 29 U.S.C. §1113, which governs the limitations period for breaches of fiduciary duty. Thereafter, petitioners Frank Monzo, Martin Morgan, and Gloria McEntee, filed a petition for rehearing on the basis that the respondents failed to meet their burden of proof regarding the "actual knowledge" standard for the statute of limitations which the Third Circuit held was applicable. The Court of Appeals denied the Petition for Rehearing on May 7, 1997. [Appendix at 144a-146a]. The petitioners have filed a timely Petition for Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE WRIT FOR CERTIORARI

It is respectfully submitted that this Honorable Court should grant certiorari in this case for the following compelling reasons: First, the restrictive definition of "serious consideration" imposed by the Third Circuit Court of Appeals establishes an important decision on the interpretation of fiduciary duties imposed by ERISA which has not been settled by the Supreme Court. Because this decision could impact plan participants and companies throughout the country, the Supreme Court, as final arbiter of federal issues arising under ERISA, should finally determine when the fiduciary obligation to inform plan participants of potential changes to a pension plan arises, particularly under circumstances where, as here, the plan fiduciary is aware that participants are asking questions regarding such changes in order to make important decisions as to if and when to retire.

Secondly, the restrictive three prong test of serious consideration imposed by the Court of Appeals permits plan fiduciaries to advise participants that there are no plans for a change to the pension plan at a time when the company is indeed undertaking considerable planning efforts towards such a goal. At the very least, this communication, authorized by the decision of the Court of Appeals, is misleading and as such, is in contravention to the policies established by this Court in the recent case of Varity Corp. v. Howe, ___ U.S. ___, 134 L. Ed.2d, 116 S. Ct. 1065 (1996).

Third, there is a serious conflict among the Circuit Courts which have been asked to address this issue under factual circumstances similar to the instant case. If this conflict is left unresolved, companies offering benefit plans, particularly those which operate on a country-wide basis, will be in the position of not being able to determine when, under ERISA, they are obliged to inform plan participants of potential changes to a pension plan. At one end of the spectrum is the decision of the Second Circuit in Ballone v. Eastman Kodak Co., 109 F.3d 117 (2nd Cir. 1997), wherein the Court concluded, relying principally upon the Supreme Court's decision in Varity Corp. v. Howe, supra, that a fiduciary duty to refrain from making affirmative material misrepresentations may arise even before a future plan change is under serious consideration. The Court recognized that serious consideration, while relevant to the determination of the materiality of a misrepresentation, is not a prerequisite and is certainly not the sine qua non of materiality. At the opposite end of the spectrum is Muse v. International Business Machines Corp., 103 F.3d 490 (6th Cir. 1996), cert. denied, 137 L.Ed.2d 1048 (1997), wherein the Court concluded that not only must the plaintiffs prove that a plan change was under serious consideration before a fiduciary duty exists, but that serious consideration does not arise until a company focuses on one particular plan for a particular business purpose. Under the Sixth Circuit's new test, serious consideration arises only when the employer has a concrete, defined plan in place, to the exclusion of all other variable or alternative enhanced plans and implementation of that concrete plan is inextricably tied into a specific triggering business event. The Eighth Circuit in Wilson v. Southwestern Bell Telephone Company, 55 F.3d 399 (8th Cir. 1995), took a middle ground position, requiring a finding of serious consideration, but not imposing such strict limitations on the definition thereby appropriately permitting the trier of fact to consider all of the evidence which may, as in this case, clearly establish that the company was seriously considering a change to the pension plan at a time before a specific proposal was under discussion by senior management having authority to implement such a plan. The Tenth Circuit, however, in the case of Hockett v. Sun Company, Inc., 109 F.3d 1515 (10th Cir. 1997) has followed the three prong test established in Fischer II, supra. Unequivocally,

the confusion created by these diverse decisions in the Circuit Courts of Appeals should be resolved by the Supreme Court.

Finally, there is a split in the Circuit Courts of Appeals concerning the interpretation of the six year statute of limitations for breaches of fiduciary duties in cases of fraud or concealment as set forth in 29 U.S.C. §1113 of ERISA which is of sufficient significance to warrant review by the Supreme Court.

A. This Case Presents an Important Question of Federal Law that has not been Settled by the Supreme Court.

ERISA protects employee pensions by, in part, imposing certain general fiduciary duties applicable to the management of pension benefit plans. See, ERISA §404, 29 U.S.C. §1104. [Appendix at 147a]. Indeed, ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA §404(a), 29 U.S.C. §1104(a). Id.

The duties of an ERISA fiduciary are not limited by the statute's expressed provisions, but instead, include the duties derived from common law trust principles. Varity Corp. v. Howe, supra. The fiduciary requirements imposed under ERISA have been described as having the following three components: "(a) duty of loyalty pursuant to which all decisions regarding an ERISA plan 'must be made with an eye single to the interest of the participants and beneficiaries.'" Donovan v. Bierwirth, 680 F.2d 263, 273 (2nd Cir. 1982); the "prudent man" fiduciary obligation which, when combined with the duty of loyalty, imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to plan participants and beneficiaries and in so doing to act as a prudent person would act in a similar situation. Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984); and finally, an ERISA fiduciary must act "for the exclusive purpose" of providing benefits to plan beneficiaries. Donovan v. Bierwirth, supra at 271.

In judicially defining the scope of these fiduciary duties, the United States Supreme Court has recently confirmed that intentional

misrepresentations are inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1074.

The question which the petitioners ask this Court to review -- when does an ERISA fiduciary have an obligation to truthfully inform plan participants that it is considering a change to the pension plan -- presents an issue of first impression before this Court which many courts of appeals around the country have been asked to address under factual circumstances similar to the instant case. See, Hockett v. Sun Co., supra; Ballone v. Eastern Kodak Co., supra; Muse v. International Business Machines Corp., supra; Vartanian v. Monsanto Co., 14 F.3d 697 (1st Cir. 1994); Mullins v. Pfizer, Inc., 23 F.3d 663 (2d Cir. 1994); Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154 (6th Cir. 1988); Drennan v. General Motors Corp., 977 F.2d 246 (6th Cir. 1992); Wilson v. Southwestern Bell Telephone Co., supra; Maez v. Mountain States Tel. and Tel., Inc., 54 F.3d 1488 (10th Cir. 1995). Most of the courts addressing the issue have determined that the duty to inform (or stated otherwise, the duty to refrain from affirmative material misrepresentations) arises when plans to change a pension benefit are under "serious consideration." Guidance is required from the United States Supreme Court to determine just exactly what constitutes "serious consideration" for purposes of invocation of this fiduciary duty.

Petitioners submit that the Second Circuit has appropriately determined that "serious consideration" is not the key factor in deciding if an employer has breached its fiduciary duty under ERISA to speak truthfully about future benefits; rather, the important question to be decided by the trier of fact is whether, based on all of the evidence presented, the alleged misrepresentation by the employer regarding future benefits was material to the employee's retirement decision. Ballone v. Eastman Kodak Co., supra. As the Ballone Court recognized:

> Regardless whether the employer is seriously considering altering its retirement plan, the employer's false assurance that future

> enhancements have been ruled out for some specific period can be decisive in inducing an employee to hasten retirement, rather than delay in the hope of receiving enhanced future benefits. **This aspect of the assurance can render it material regardless of whether future changes are under consideration at the time the misstatement is made.** Id., 109 F.3d at 124. [Emphasis added].

The Ballone Court appropriately determined that the trier of fact should analyze all of the evidence to determine whether the representations made by the employer/fiduciary were materially false. To the contrary, the Third Circuit in Fischer II, has essentially usurped the function of the trier of fact by defining "serious consideration" in such a restrictive manner that the duty to truthfully inform plan participants about a possible change to the pension plan can almost never arise until the end stage of an exhaustive planning process when senior management decides to recommend such a change to the person who has the ultimate authority to implement the amendment.

The predictable impact of the Third Circuit's far reaching decision is to enable companies to mislead plan participants into believing that no change to the pension plan is being contemplated when, at the same time, senior management has indeed delegated to middle management the responsibility to plan such a change. Under the Third Circuit's definition of "serious consideration," such action would not invoke the fiduciary duty to truthfully inform inquiring plan participants of this activity even if senior management knows that recommendation of such a plan change is inevitable given the particular circumstances with which the company is faced. Indeed, the instant case provides an excellent example of this scenario.

The extensive history of PECo's planning efforts submitted to the District Court for consideration, and set forth above, clearly established that: (1) as early as 1985, PECo projected that it would

improve the pension plan formula by no later than January 1, 1988; (2) PECo's pension benefits were continuing to deteriorate in comparison with other surveyed utility companies and in fact, the data from the 1986 pension study received in February 1987 confirmed that PECo's pension benefits had become fairly non-competitive; (3) senior management charged with the responsibility of developing a pension plan change proposal, Mr. Frederick Beaver already contacted an outside consultant, TPF&C, as of February 27, 1987 to begin costing out a pension formula that represented a change to the pension plan. Mr. Fritz, the vice president of personnel and industrial relations, who was the person to take proposals which had been developed by TPF&C to the Board of Directors to formally request a change to the pension plan, was aware of Mr. Beaver's action. Despite the fact that there was a specific event which made consideration of a pension plan change necessary (the deterioration of PECo's pension benefits) and its eventual recommendation to the Board of Directors inevitable, and despite the fact that the development of the pension plan proposal was being marshalled by Mr. Beaver and Mr. Fritz in accordance with their duties, their activity in preparing proposals for the pension plan change did not constitute "serious consideration" under the Third Circuit's three-prong test because they were not senior management having the ultimate authority to recommend such a change to the Board of Directors. The Third Circuit has thus approved of PECo's action in telling plan participants that no changes to the pension plan were being contemplated at a time not only when PECo was indeed spending thousands of dollars to develop proposals, but at a time when Mr. Fritz in fact advised the executives of the IGA (an employee group) that the timing was right for making significant changes in the pension plan. Left unchallenged, the Third Circuit's three-prong test sets a dangerous precedent which is detrimental to the protection afforded to plan participants under ERISA. For this reason, certiorari should be granted so that the Supreme Court can finally determine when the fiduciary duty to truthfully inform plan participants of future pension changes arises.

B. The Third Circuit's Decision Conflicts with the Duties of a Fiduciary under ERISA as Espoused by this Court.

In Varity Corp. v. Howe, supra, the United States Supreme Court recently reviewed the circumstances under which an employer who was also a plan administrator has fiduciary obligations to plan participants when communicating about plan benefits. The Court held that "conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power appropriate to carrying out an important plan purpose," and as such gives rise to the fiduciary obligations under ERISA. Varity Corp. v. Howe, supra, 116 S. Ct. at 1073. Once reaching that decision, the Court had no difficulty in deciding that in misleading beneficiaries, the employer violated the fiduciary obligations that ERISA §404 imposes upon plan administrators, noting as other courts have held that "lying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in Section 404(a)(1) of ERISA. Id, 116 S. Ct. at 1074 [citations omitted].

This Court's decision in Varity v. Howe, supra, makes it abundantly clear that a plan fiduciary cannot affirmatively mislead plan participants about the likely future of plan benefits. Under the Third Circuit's three-prong test of serious consideration, however, a company can effectively engage in such conduct without violating ERISA fiduciary imposed duties. Consider this possibility. A company president advises the manager of corporate benefits that he needs to reduce costs quickly and asks the manager to develop proposals, including an early retirement incentive, to accomplish this goal. The manager then, on instruction from the president, seeks outside assistance in developing such plans for ultimate consideration by those with authority to recommend such a plan to the Board of Directors. Despite the fact that the mandate came from the president of the company himself who had a precise goal in mind, to reduce costs quickly, the company would still have the right under the Third Circuit's definition of serious consideration, to inform inquiring plan participants that there were no such plans being contemplated. It is submitted that even though permitted under the Third Circuit's definition of serious consideration, such a statement is misleading, and consequently, contrary to the policies established under ERISA for the protection of employee benefits as espoused by the United States Supreme Court in Varity v. Howe, supra.

C. The Third Circuit's Decision Conflicts with Decisions of other Courts of Appeals.

The case under review is indirect and irreconcilable conflict with Ballone v. Eastman Kodak Company, supra, and this conflict further illustrates the growing confusion which exists in the lower Federal Courts regarding the scope of an employer's fiduciary duty to communicate truthfully with employees regarding future benefit plans.

Similar to the instant case, the approach of the District Court in Ballone limited its deliberation to a single question -- whether the employer was seriously considering implementing an enhanced plan at the time it made the alleged misrepresentations. The District Court concluded that since the plan was not under serious consideration, any alleged misrepresentations were immaterial. The Second Circuit, however, disagreed with the District Court's approach:

> We first address the District Court's conclusion that "serious consideration" of a plan change is the prerequisite to materiality, where a plan fiduciary makes alleged misrepresentations to ERISA plan beneficiaries leading them to believe that future plan changes have been ruled out. We hold that it is not. We next address the Court's conclusion that absent serious consideration of plan changes, no statement about future plan benefits can be misleading. We disagree with the District Court's conclusion on this point as well. Id, 109 F.3d at 122.

Relying principally on Varity Corp. v. Howe, supra, the crux of the Second Circuit holding is captured in the following:

> Applying these trust-law principles, it is clear that Kodak may not actively misinform its plan beneficiaries about the availability of future retirement benefits to induce them to retire earlier than they otherwise would, **regardless of whether or not it is seriously considering future plan changes.** Kodak has a duty to deal fairly and honestly with its beneficiaries. Id, 109 F.3d at 124. [Emphasis added].

The holding in Ballone is in direct conflict with the Third Circuit's opinions in Fischer II and Kurz II, and the Tenth Circuit's opinion in Muse v. International Business Machine Corp., supra, wherein the Courts held that serious consideration was the **only** factor which would trigger the employer's duty to truthfully inform plan participants about future benefits under ERISA.

The Third Circuit's decision is also in conflict with the decision of the Eighth Circuit, in Wilson v. Southwestern Bell Telephone Company, supra, wherein the Court, although relying on the "serious consideration" test, left the question of when serious consideration begins up to the trier of fact who, after all, is in the best position to weigh and evaluate all of the evidence in the context in which it is presented. No restrictive three prong test or other definition of serious consideration is imposed upon the trier of fact by the Eighth Circuit. To this extent, the novel, three prong test developed by the Third Circuit is in conflict with the decision of the Eighth Circuit.

In reality, the Third Circuit's opinions in Fischer II and Kurz II are also in conflict with the Third Circuit's initial decisions in these case. In Fischer I, the Court likewise concluded that the determination of whether "the content of the particular communications PECo allegedly made to members of the plaintiff class and whether such communications constituted affirmative misrepresentations are questions of fact properly left to the trier of

fact on remand." Fischer I, supra, 994 F.2d at 135. [Appendix at 89a]. It is obvious that after the District Court fulfilled its obligation as the trier of fact to determine when serious consideration began in this case, the new panel for the Third Circuit Court of Appeals hearing the case on the second appeal was unhappy with the outcome and therefore developed a restrictive definition of serious consideration which would assure that serious consideration can never be deemed to begin until all of the planning efforts for a change to pension benefits is virtually completed and recommendation to the person with ultimately authority to implement such changes is imminent.

Significantly, in the first appeal in the Kurz, case supra, the Third Circuit rejected the imposition of a bright-line rule in determining when an affirmative misrepresentation is material recognizing that "any approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." Id, 994 F.2d at 139 (Appendix at 97a), quoting Basic Inc. v. Levinson, 485 U.S. 224, 236, 108 S. Ct. 978, 986, 99 L. Ed.2d 194 (1988). Yet, the three prong test unequivocally establishes such a bright-line rule in the sense that it does not permit the trier of fact to take into consideration fact specific evidence which may lead to the conclusion that serious consideration began before the three prong test is satisfied.

This conflict among the Circuits should be resolved by the Supreme Court, particularly given the far-reaching implications of the Third Circuit Court of Appeals' decision.

D. The Third Circuit's Decision Regarding the Applicable Statute of Limitations Conflicts with Decisions of Other Courts of Appeals.

On remand to the District Court, the respondents raised the statute of limitations as a defense to petitioners' claims based upon PECo's breach of fiduciary duties, arguing that the three year "actual knowledge" statute of limitations set forth in ERISA, 29

U.S.C. §1113 (Appendix at 147a) barred the petitioners' action which was filed approximately three and one-half years after the announcement by PECo of the pension plan change. The District Court, however, disagreed that the petitioners' claims were barred, finding that the six-year exception to the three year statute of limitations in cases involving fraud or concealment was applicable and that therefore the petitioners' claims were timely filed. The Third Circuit reversed, holding that the six-year statute of limitations for fraud or concealment was not applicable because there was no claim that PECo had attempted to conceal its alleged breach of fiduciary duty. In this respect, the Third Circuit has joined the First, Seventh, Eighth, Ninth and D.C. Circuits in finding that this statute of limitations incorporates the federal doctrine of fraudulent concealment, meaning that the defendant must have taken affirmative steps to hide the underlying breach of fiduciary duty for the six year statute of limitations to be applicable. Stated otherwise, these courts have held that the mere fact that the underlying breach of fiduciary duty involves a claim of fraud or concealment is not sufficient to trigger the six year statute of limitations for fraud or concealment. Kurz v. Philadelphia Electric Co., supra, 96 F.3d at 1552; J. Giels Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245 (1st Cir. 1996), cert. denied, 136 L.Ed.2d 39, 117, S.Ct.81 (1996); Barker v. American Mobile Power Corp., 64 F.3d 1397 (9th Cir. 1995); Larson v. Northrop Corp., 21 F.3d 1164 (D.C. Cir. 1994); Martin v. Consultants and Administrators, Inc., 966 F.2d 1078 (7th Cir. 1992); Shaefer v. Arkansas Medical Society, 853 F.2d 1487 (8th Cir. 1988). To the contrary, the Second Circuit has considered this issue and held that "for a breach of fiduciary duty involving fraud or concealment, the three year exception of actual knowledge does not apply, and a party has six years from the time it discovered the breach to bring an action." Diduck v. Kaszycki & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989). Petitioners submit that the United States Supreme Court must intervene to resolve this dispute among the circuits, particularly in view of the fact that the majority of the circuits are interpreting the statute in a manner inconsistent with its clear language.

CONCLUSION

The Petition for Writ of Certiorari should be granted as to carry out the Court's mandate that honesty should prevail in the administration of pension plans by employer fiduciaries.

Respectfully submitted:

Ronald L. Wolf, Esquire*
Martina W. McLaughlin, Esquire
LITVIN, BLUMBERG, MATUSOW & YOUNG
The Widener Building, 18th Floor
1339 Chestnut Street
Philadelphia, PA 19107
(215) 557-3300
Counsel for Petitioners
**Counsel of Record*